



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**MEMORANDUM**

TO: Patricia C. Orrock  
Chief Compliance Officer

January 8, 2018

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SUBJECT: Preliminary Audit Report on O'Malley for President (LRA 1007)

**I. INTRODUCTION**

The Office of General Counsel ("OGC") has reviewed the Preliminary Audit Report ("Proposed Report") on O'Malley for President ("Committee"). The Proposed Report contains five findings: Net Outstanding Campaign Obligations (Finding 1), Amounts Owed to the U.S. Treasury (Finding 2), Failure to Itemize Offsets to Expenditures (Finding 3), Reporting of Debts and Obligations (Finding 4), and Stale-Dated Checks (Finding 5). We concur with the findings and address questions raised by the Audit Division in its cover memorandum transmitted with the Proposed Report. If you have any questions, please contact Jennifer Waldman, the attorney assigned to this audit.

## **II. REFUNDED NONQUALIFIED CAMPAIGN EXPENSES DO NOT REQUIRE REPAYMENT.**

The Committee spent \$39,834 on behalf of the O' Say Can You See Political Action Committee (the "PAC"), which the PAC refunded. Since the Committee spent these funds on behalf of the PAC, these funds were not spent in connection with Martin O'Malley's campaign for nomination and therefore are nonqualified expenditures. 11 C.F.R. §§ 9032.9(a), (c); 9034.4(a)(1). After a determination by the Commission that a committee used public funds on nonqualified campaign expenses, a committee, as a general matter, is required to make a repayment. 11 C.F.R. § 9038.2(b)(2). The auditors, however, are not recommending a repayment for these nonqualified campaign expenses. The auditors argue, in part, that a repayment is not required because the Committee paid the nonqualified campaign expenses before the candidate received public funds.

We agree with the approach not to recommend a repayment but we disagree with the reasoning. All expenses, even those incurred before a committee has applied for matching public funds, must be examined until the last public dollar has been spent. *See* 11 C.F.R. § 9038.2(b)(2)(iv). As the Court of Appeals for the D.C. Circuit has recognized, "federal funds and private contributions are commingled in the candidate's coffers," and "the regulations require repayment of unqualified expenditures regardless of whether the expenditures could properly be attributed to federal matching fund payments." *Kennedy for President Committee v. Federal Election Commission*, 734 F.2d 1558, 1562 (D.C. Cir. 1984). Therefore, it is irrelevant *when* the Committee paid the nonqualified expenses if its account still maintains public funds. 11 C.F.R. § 9038.2(b)(2)(iv).

We believe the Committee does not owe a repayment because the PAC refunded the funds spent on the Committee's behalf, replacing the money spent on the non-qualified expenses. The PAC's refund restored the public funds that the Committee used for the non-qualified expenses. Since the public funds were refunded to the Committee, these funds were available to pay other qualified campaign expenses or to repay the Treasury if the Committee had been in a position of carrying a surplus or it had received public funds in excess of its entitlement. *See* 11 C.F.R. §§ 9038.2(b)(1), (4). Therefore, any payment to the Treasury for these non-qualified campaign expenses would be a penalty. A repayment determination is not meant to be a penalty, rather it is a method of making the government whole. *Kennedy for President*, 734 F.2d at 1565 (explaining that a repayment is not a penalty but it "merely recoups [the] money expended by the candidate in violation of conditions he or she voluntarily assumed in order to receive the matching funds.").

## **III. AUDIT DIVISION SHOULD INCLUDE THE FINDING ON THE USE OF PUBLIC FUNDS TO DEFRAY NONQUALIFIED CAMPAIGN EXPENSES.**

Although the Audit Division is not recommending a repayment for the use of public funds to pay nonqualified campaign expenses, we believe that there should be a finding in the audit report to discuss the fact that the Committee used public funds for this purpose. One of the important purposes of the public financing statutes is to allow taxpayers to scrutinize publicly funded campaigns — to know where campaign finances come from and how they are spent. *Reagan Bush Committee v. FEC*, 525 F. Supp. 1330, 1340 (D.D.C. 1981) ("Clearly, section 9009(a) evinces a purpose on the part of Congress to allow taxpayers who chose to direct a portion of their taxes to the Presidential Election Campaign Fund to know exactly how those tax monies are being spent... Yet the interests protected by PECFA do not stop at the

public's right to know how tax monies are distributed, but also embrace a concern for openness and accountability to the public in the operation of Presidential campaigns") *Reagan Bush Committee v. FEC*, 525 F. Supp. 1330, 1340 (D.D.C. 1981).<sup>1</sup> Therefore, we recommend that the Audit Division revise the audit report to include a finding that addresses these nonqualified campaign expenses.

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<sup>1</sup> The court in *Reagan Bush Committee* was interpreting the Presidential Election Campaign Fund Act (general election financing statute). The statute at issue in this Proposed Report's finding is the Presidential Primary Matching Payment Account Act. However, the different statutes share a common objective of ensuring transparency regarding candidates' use of public funds.